filing applications on November 7, 1994 to establish microwave paths of communications to a number of such properties.

5. I was of the understanding at the time I submitted the February affidavit that the applications to establish microwave paths to buildings served in the Non-Common Systems configurations, and only those applications, were being opposed by time Warner. The locations we proposed to serve by microwave are presently served by the Non-Common System configuration and have never been served by microwave. I had no knowledge that Time Warner was filing oppositions against all of Liberty's applications for microwave authorizations, including the applications to provide service to the locations Liberty was serving without authority, until April of 1995, as I stated in the Surreply.

6. While perhaps I should have discussed this in the Surreply, during the preparation of that document I was focusing on the locations discussed in that document, none of which are or have been served by a Non-Common System via microwave had been opposed by Time Warner. I was unaware until that time that Time Warner had been systematically opposing all Liberty applications.

7. My responsibilities at Liberty have at all times pertained only to the technical aspects of Liberty's operations. I am not now, nor have I ever been, involved in Liberty's day-to-day business and/or legal affairs.

8. Page three of the Surreply, filed May 17, 1995, refers to my mistaken assumption of the "grant of the STA requests." Any reading of my statements in that document as being in reference to the May 4, 1995 STA requests strains the meaning and intent of my statements. It

was not my intention therein to refer to the STA requests which had only recently been filed on May 4, 1995. Those requests were filed after operation of the paths was commenced.

9. Rather, at the time the paths were turned on, I was under the assumption that each was covered by a granted request for special temporary authority. It was to those STA requests that I was referring. Liberty over the years has filed numerous STA requests, and obtained grants thereof, permitting commencement of operation on microwave paths prior to Commission action on the underlying applications. I was acting under the assumption that this procedure, i.e., the filing and grant of STA requests, had authority to render the paths operational at the time it do so. As I discovered too late, my assumption was incorrect; that procedure had not been followed and Liberty had never filed for or received special temporary authority to operate the paths in question.

10. Again, I believed at the time the paths in question were rendered operational that Liberty had the authority to commence operation. I am aware of the Commission's rule prohibiting operation of an Operational Fixed Microwave Service facility prior to the receipt of authorization therefore and I regret that these violations have occurred.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 6/12/95

Behrooz Nourain

LIBERTY CABLE
TELEVISION
Madison Avenue, New York, New York 10022
21 891-7771 Fax (212) 891-7790

PETER O. PRICE
President

June 16, 1995

EXHIBIT 8
Date: 5/25/96
Reporter: David A. Kasdan

Mr. Michael B. Hayden
Chief, Microwave Branch
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Re: Reply Ref. No. 95M003

Dear Mr. Hayden:

I am the President of Liberty Cable Company, Inc. ("Liberty"). Attached to this letter is Liberty's response by counsel to the questions asked in your letter dated, June 9, 1995.

As you know, Liberty is currently serving 15 buildings in Manhattan by microwave paths which have not yet been approved by the Commission. After discovering that these microwave applications had not been granted, we have subsequently filed applications for 16 additional buildings, but of course, have refrained from commencing service. I respectfully restate Liberty's request that the Commission issue special temporary authority to serve these buildings while it considers the underlying applications as well as any sanctions which Liberty understands it may suffer for engaging in unauthorized service. The unauthorized service to these buildings regretfully occurred because of unintended errors in Liberty's administrative procedures, for which I take full responsibility and which have been disclosed and explained at some length in previous filings with the Commission. A complete investigation of this administrative foul-up is currently being conducted by outside counsel who have extensive government backgrounds. Steps have been implemented to assure that these errors will not occur again.

Liberty understands that it may be sanctioned by the Commission for the unauthorized service to these 15 buildings. Furthermore, Liberty will suspend service to these buildings immediately if and when the Commission directs. Service has not been suspended as of today out of concern for the consumers in these buildings. As detailed in the attached submission, five of the 15 buildings were not served by any MVPD prior to Liberty. Therefore, an immediate cessation of Liberty service would leave such consumers without service for weeks -- if not months, despite the fact that they have done nothing wrong. In the remaining buildings, it might take Time Warner days -- if not weeks -- to recommence service

Liberty does not expect to profit from this service. As of this date and until this matter is resolved, Liberty will not charge for the service provided to these buildings. Liberty is exploring alternative, lawful means for it to deliver video service to these buildings. As previously stated, Liberty will terminate service at these locations if the Commission so directs. However, we request that in making this determination, the Commission provide sufficient time for Time Warner, Liberty or another MVPD to make alternative arrangements to service these buildings without any significant hardship to consumers.

The Commission is, no doubt, aware that applications and requests for special temporary authority were filed some time ago for each of the 15 buildings. Pending also are 16 other applications and requests for STAs, where subscribers who have opted for Liberty service are awaiting the Commission's determination. In determining any sanction which Liberty may suffer for our careless administrative errors and in determining whether and when to order Liberty to halt service to the subscribers in the 15 buildings, I would respectfully ask the Commission to consider the interests of such truly innocent subscribers.

I would also ask the Commission to consider the overall importance of Liberty's entry into the market in the last several years. The Commission has previously noted that Liberty has proven to be a much-needed force for competition which transcends the New York City market. While Liberty clearly understands that our administrative failings are a cause of our current predicament, it is also clear that there is a strong competitive dimension to this situation and that the fate of competition in this crucial market may well be determined by the Commission's handing of this matter. I would also ask that any directive concerning termination of service and sanctions be communicated directly to me.

Thank you for your consideration of the issues I have raised in this letter.

Respectfully submitted,

Peter O. Price

att.

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June 16, 1995

Via Telecopy 717/337-1541 & Federal Express

Mr. Michael B. Hayden
Chief, Microwave Branch
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Re: Reply Ref. No. 95M003

Dear Mr. Hayden:

Liberty respectfully repeats its request that the Commission grant its STA requests without further delay. Liberty is responding to the each of the questions posed in your June 9, 1995 letter; however, we urge the Commission to grant Liberty the STAs (assuming, of course, that all technical aspects of those applications are in order) and to utilize this information in the context of resolving the pending petitions to deny on their merits. As discussed in Section IV(B) below, Liberty's ability to provide service to new subscribers has been curtailed as a result of the pending petitions to deny. Liberty's ability to continue doing business is at risk. The FCC has not granted Liberty a single OFS license for over four months. Liberty now has 43 pending OFS applications. Fifteen are for the buildings in Section II below, sixteen are for buildings which have con-

tracts with Liberty but where service has not been activated (as discussed in Peter Price's attached letter) and twelve are for the buildings currently being serviced by hard wire which are the subject of the federal litigation discussed below. Liberty has not activated a single new building for over two months. This is precisely the type of situation where the grant of STAs is appropriate, in order to enable Liberty to continue to provide service to subscribers who have requested Liberty service while permitting the FCC adequate time to reach a decision on the merits of Time Warner's petitions to deny.

I. **The Nourain Statements are Consistent**

You have directed Liberty to "explain the [Time Warner alleged] inconsistencies" between an affidavit submitted by Behrooz Nourain, Liberty's Chief Engineer, with Liberty's May 17, 1995 Surreply (in which the Commission was informed of Liberty's unauthorized operations) and Mr. Nourain's February 21, 1995 affidavit, submitted in a lawsuit pending in the United States District Court for the Southern District of New York challenging the constitutionality of 47 U.S.C. § 522(7), the common ownership provision (the "First Amendment Lawsuit"). Specifically, Time Warner has compared Mr. Nourain's May 17 statement that he was unaware of Time Warner's petitions to deny with his February affidavit in which he stated that he had been "advised" of Time Warner's opposition to "Liberty's pending application to the

Federal Communications Commission for various 18 GHz microwave licenses."

Mr. Nourain clarifies this issue in his attached declaration. Exhibit 1, hereto, Declaration of Behrooz Nourain. The placement of each of these statements in its proper context demonstrates that they are consistent.

A. The February 21, 1995 Affidavit and the First Amendment Lawsuit

In order to understand the context of the February 21, 1995 affidavit, a brief summary of events in the First Amendment Lawsuit is necessary. The First Amendment Lawsuit arose out of the attempt of the New York State Commission on Cable Television ("NYSCC") to terminate Liberty's service to subscribers in its "Non-Common Systems"[1] unless Liberty acquires a franchise from the City of New York[2]. At the same time that NYSCC was threatening to terminate unfranchised service in Liberty's Non-Common Systems, the City had no procedure to franchise systems that did not utilize City property. On December 9, 1994, NYSCC issued a

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[1]Liberty's Non-Common Systems are configurations where Liberty serves two non-commonly owned, operated or managed building by placing a microwave reception antenna on the roof of one building and running a coaxial cable to the second building utilizing only private property. 47 U.S.C. §522(7)(B) defines these Non-Common Systems as "cable systems".

[2]On August 24, 1994, NYSCC issued an Order to Show Cause directing Liberty to demonstrate why NYSCC should not immediately terminate service on its Non-Common Systems. NYSCC initiated this proceeding in response to a May 23, 1994 complaint against Liberty that was filed by Time Warner

Standstill Order barring Liberty from constructing or activating any new Non-Common Systems.

On December 8, 1994, Liberty commenced the First Amendment Lawsuit against the New York City Department of Information Technology and Telecommunications ("DOITT"). Liberty amended its complaint on December 13, 1994 to include NYSCC. Liberty alleged that the Common Ownership Requirement, on its face and as applied, imposed an unconstitutional burden on its Non-Common Systems under the *O'Brien/Turner* heightened scrutiny test. Liberty also asserted that the City and NYSCC were violating its rights under the due process clause by penalizing Liberty for not having a franchise despite the absence of a City procedure for issuing Liberty a franchise. On the day that Liberty filed the Complaint, it notified the United States' Attorney of this constitutional challenge.

On December 21, 1994, Liberty moved for a temporary restraining order and a preliminary injunction against NYSCC's Standstill Order and against NYSCC's attempts to enforce the Common Ownership Requirement by terminating service to subscriber's in Liberty's Non-Common Systems.

On December 22, 1994, the court granted Liberty the TRO and set a briefing schedule for opposition and reply papers.

The United States and Time Warner intervened as defendants and, along with the other defendants, opposed Liberty's motion. William E. Kennard and the FCC appeared as "Of Counsel" on the

United States' brief. Each defendant, including the United States (See U.S./FCC Brief at 22), argued *inter alia*, that the Common Ownership Requirement did not burden Liberty's First Amendment rights because Liberty had "'ample alternative channels for communications'" *Id.*[2/] The United Stated argued that "Liberty could avoid the franchise requirement and fit within the private cable exemption by delivering service to contiguous non-commonly owned buildings using a means other than cable. Thus, Liberty ... could install microwave reception equipment at the contiguous property for buildings with line of sight from their head-end facility, or it could establish a line of sight from a building which could serve as a retransmission point".

It was in response to the argument that Liberty could substitute its coaxial cable links with microwave transmissions, and in an attempt to correct numerous misstatements made by a Time Warner engineer concerning the cost and feasibility of making such a substitution that Mr. Nourain submitted his February 21, 1994 affidavit. In his affidavit, Mr. Nourain addressed two

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[2/]The United States also argued that Liberty's case was not ripe for adjudication because the issue was not fit for review and would not be fit for review until Liberty had applied for a franchise (pursuant to a nonexistent procedure) and could identify each burden imposed by the franchise. U.S./FCC Brief at 10-11 ("Whether the defendants will exercise their regulatory authority in a way that might violate plaintiffs' constitutional rights is not ascertainable on the record that is before this Court"). The United States ultimately prevailed in its ripeness argument before the district court and, when Liberty appealed the dismissal, the United States and the FCC once again argued that Liberty's challenge was unripe.

specific issues. First, he discussed the financial and technical obstacles to substituting microwave transmissions for coaxial links in the Non-Common Systems. Second, he pointed out that Liberty had applied for microwave licenses for Non-Common Systems (which would enable it to implement a substitution if it became necessary) and that those particular microwave licenses had been opposed by Time Warner. In light of the petitions to deny, the arguments made by the government defendants and by Time Warner, that Liberty could serve the derivative buildings in its Non-common Systems by microwave were incorrect and intentionally so[4].

At the time he submitted his February affidavit, Mr. Nourain understood only that Time Warner had opposed the applications Liberty had filed in an effort to provide an alternative means of service to the derivative buildings in its Non-Common Systems. *See* Declaration of Behrooz Nourain, annexed hereto as Exhibit 1. It was Mr. Nourain's understanding at the time of the February affidavit that those were the only applications that Time Warner had opposed. Exhibit 1.

B. **Liberty's Surreply**

Liberty's Surreply addressed Liberty's provision of unauthorized microwave service to the locations listed in Section II

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[4]Time Warner made this statement despite the fact that, at the same time, it was attempting to delay indefinitely the grant of those applications by filing petitions to deny.

below. It was those locations to which Mr. Nourain's attention was directed during the preparation of that document. Exhibit 1. He was not then discussing buildings that are at issue in the First Amendment Lawsuit, which are not served by microwave and have never been served by microwave. Exhibit 1. Mr. Nourain did not learn that Time Warner was opposing all Liberty applications, including the applications to provide service to the locations Liberty was serving without authority, until April, 1995. Exhibit 1. It was his discovery in April that Time Warner was opposing all Liberty applications to which he was referring in the Surreply. Exhibit 1.

Mr. Nourain's February 21 affidavit and his May 17 declaration were submitted in entirely different contexts. Placement of each in its appropriate context clarifies the alleged inconsistency and demonstrates that Mr. Nourain has been truthful in his efforts to assist in the resolution of this proceeding.

C. **The Timing of the STAs**

Time Warner also alleges "that [Mr. Nourain's] affidavit falsely indicates that transmission paths were inadvertently turned on after the filing of STA requests when in fact the paths were placed in operation in April prior to STA requests made on May 4, 1995." Mr. Nourain was not referencing the May 4, 1995 STA requests in the Surreply nor was it his intention to do so. Exhibit 1. As Mr. Nourain illustrates in his attached declaration, when the paths were rendered operational he was under two

(mistaken) assumptions: (1) that STA requests covering the paths had been filed prior to the time Liberty commenced operation on the paths and (2) that each such STA request was granted prior to the time Liberty commenced operation on the paths. Exhibit 1. It was those requests, which he discovered all to late were non-existent, to which he was referring. Exhibit 1.

II. **Factual Data Concerning the Unauthorized Paths**

Below is a list identifying the date each unauthorized path was placed in operation and the number of subscribers currently being served at each location:

Receive Site	Service Commenced	# of Subscribers
639 West End	February 14, 1995	53
1775 York Ave (the Brittany)	January 16, 1995	80
35 West End	January 3, 1995	335
767 Fifth Ave. (General Motors Bldg)	April 17, 1995	16
564 First Avenue (NYU Medical Resident Hall)	January 3, 1995	56
545 First Avenue (Greenburg Hall, NYU)	January 3, 1995	36
524 E. 72nd	November 16, 1994	146
30 Waterside	March 15, 1995	334
16 W. 16th St.	March 28, 1995	213
433 E. 56th St.	December 27, 1994	58
114 E. 72nd	January 30, 1995	40
25 W. 54th	February 6, 1995	45

200 E. 32nd	March 27, 1995	111
6 E. 44th St.	April 19, 1995	50
2727 Palisades	April 24, 1995	97

III. **Ability of Liberty Subscribers to Switch Services**

In response to your question, there are no contractual or other barriers erected by Liberty which prevent Liberty subscribers from electing to receive service from Time Warner. Furthermore, with the minor exceptions noted below, there are no barriers to other MVPDs serving these subscribers. Certain buildings cannot readily receive Time Warner service, however, because Time Warner and its predecessors have never wired those buildings for cable. Consequently, Liberty is the first MVPD to provide service to residents of 35 West End Avenue, the two NYU dormitories, the Cornell Club (6 East 44th Street) and the General Motors Building (767 Fifth Avenue). While no contractual barrier prevents those buildings from receiving Time Warner service; in practical terms, it would take weeks -- if not months -- before Time Warner could arrange to provide such service.

With respect to the other buildings on the above list, Time Warner has previously provided service to subscribers therein and building residents currently have the choice between Time Warner and Liberty service. As a cable television company in Manhattan, Time Warner has the *right*, under New York State Executive Law § 828, to provide service to subscribers in any building in which

there is a request for its service[5]. It has the absolute right to do so even over the objection of the property owner. *Id.; See also Loretto v. Teleprompter Manhattan CATV Corp.*, 52 N.Y. 2d 124, 440 N.Y.S. 843, 423 N.E. 2d 320 (1981)(upholding § 828 as a valid exercise of state's police power). Thus, Time Warner retains the right to maintain a presence -- and has, in fact, maintained a presence -- in each of the buildings served by Liberty.

Moreover, nothing in the Private Cable Agreements that Liberty enters into with cooperative, condominium and rental buildings prevents residents of those buildings from continuing to receive Time Warner service or from switching back to Time Warner service after subscribing to Liberty. A copy of a typical Private Cable Agreement is annexed as Exhibit 2.[6] Because every Liberty subscriber has the option to receive Time Warner service, the only device Liberty has for maintaining subscribers is its provision of superior service at a lower price than that provided by Time Warner.[7]

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[5] Section 828 provides, in pertinent part, that "No landlord shall (a) interfere with the installation of cable television facilities upon his property or premises..." N.Y.S. Exec. Law § 828.

[6] Although each Private Cable Agreement differs to a certain degree, as a result of the terms negotiated by each individual building, Exhibit 2 is a representative sample.

[7] Conversely, the vast majority of Time Warner subscribers do not have the luxury of choosing an alternative cable provider if they are dissatisfied with Time Warner's service.

Unlike Time Warner's subscribers, Liberty's subscribers also benefit from contractual protections that they themselves negotiate. When Liberty contracts with a building to provide service, the building's board or owner negotiates provisions that provide its residents adequate protection should Liberty not perform as promised.[1] Liberty's contracts guarantee subscribers the ability to terminate upon 90 days' notice[2] if Liberty fails to fulfill any one of the following terms:

(a) install the system during an agreed upon time period;

(b) obtaining the owner's approval prior to implementing installation plans;

(c) repairing any property damage caused by Liberty to the reasonable satisfaction of the owner;

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[1] In addition, each building is free to negotiate any other terms it deems desirable. For instance, some buildings (and all rental buildings) decide to enter into "retail" contracts with Liberty, whereby Liberty markets itself to each subscriber individually for both basic and premium service. Other buildings choose to enter into "bulk" contracts, pursuant to which Liberty provides a lower rate for basic service in return for a guaranteed minimum number of subscribers (frequently substantially less than the total number of units in the building). In these buildings, Liberty still markets itself and contracts directly with individual subscribers who receive premium service. Generally, in buildings that decide to enter into bulk contracts, the building pays Liberty a monthly fee for each basic subscriber and incorporates the fees in the subscribers' monthly common charges.

[2] In the First Amendment Lawsuit, in which Time Warner is an intervenor, Time Warner's President, Richard Aurelio, falsely asserted that Liberty's subscribers are bound by long-term contracts which can only be terminated on ten years' notice. See Excerpt of Affidavit of Richard Aurelio at ¶33(e), attached hereto as Exhibit 3. In making this assertion of "fact," Mr. Aurelio failed to mention the right of Liberty's subscribers to terminate their contracts under provisions contained in the very contract cited by Mr. Aurelio as "anticompetitive."

(d) providing comparable programming to the local franchised cable television operators;

(e) meeting the standards of cable service, including equipment, new and state of the art technology, inter-activity and programming provided generally by the franchised cable television operator to any other property in the neighborhood of the subscribing property;

(f) providing a video signal comparable to the signal quality of cable television systems as required by the rules and regulations of the FCC;

(g) keeping rate increases under 6% per annum and keeping rates lower than those of the franchised cable operators;

(h) responding to requests for service or repair within one working day after the receipt of such request.

Exh.2 at ¶¶4, 6, 7, 8, 9, 12 and 16. If Liberty defaults on any one of the above obligations, the subscriber is entitled to provide Liberty with a default notice and, in the absence of a cure, to terminate ninety days after the date of the default notice. Id at ¶16.

Some of Liberty's Private Cable Agreements contain a provision in which the building owner promises that "except as required by law for the franchised cable company or any other video distributor, no other pay or cable television service will be distributed at the Property." Id at ¶10. Obviously, this provision does not, and cannot by law, serve as a barrier to Time Warner's continued presence in a building that contracts with Liberty. More importantly, the subscribing buildings have the option of, and in numerous cases actually have, deleted that provision from their Private Cable Agreements. Finally, this

provision is no longer part of Liberty's Private Cable Agreements and has not been so since May, 1995.[10]

Liberty subscribers are free to switch to Time Warner. Furthermore, except as noted, they are free to subscribe to any other MVPD. As Time Warner succinctly put it, "Time Warner is available to provide service to those individuals as expeditiously as possible. Indeed, Time Warner already provides cable service to subscribers in most of these buildings." See Response to Surreply at 11. Time Warner neglected to say that if those subscribers, who have elected to receive Liberty's unique (and more economical) programming services, are forced to switch back to Time Warner, they will have been deprived of the ability to receive the service they choose. This deprivation of the ability to choose the political, business and artistic communication they want to receive is an unconstitutional prior restraint of the subscribers' First Amendment rights.

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[10] Liberty does not need to include any exclusivity provisions in its contracts to guarantee that no competitor other than Time Warner can provide service to its subscribers because Time Warner has already accomplished this feat. With the exception of the subscribers in the approximately 150 buildings served by Liberty, every individual in Manhattan who wants cable television service can receive it from only one provider -- Time Warner. It can be assumed that any other potential competitors to Time Warner have been warned off by the scorched earth tactics that Time Warner has employed to make it nearly impossible for Liberty to continue to operate and expand in Manhattan. As Time Warner admitted in its "Response to Surreply" (see p.11), its solicitous "concern" for compliance with FCC regulations is merely one more weapon in the arsenal it has directed at Liberty.

The assertion implicitly made by Time Warner, that Liberty's subscribers will not be harmed if they are deprived of their choice to receive Liberty's programming and are forced to switch back to Time Warner's, is insupportable. Basic principals of competition law, as well as the First Amendment, guarantee subscribers the right to make their choice of an MVPD in a competitive environment, where they can select among providers who offer competing program content and other price and quality options.

IV. Liberty's Unintentional Activation of the Unauthorized Paths Should Not Bar Grant of the STAs

A. The Merits of the Petitions to Deny Relate to the First Amendment Lawsuit

Liberty requests that the Microwave Branch take official notice of the extraordinary context in which Liberty unwittingly commenced unauthorized service to many of the above referenced locations and then voluntarily disclosed these in its previously filed Surreply. During the last several years Liberty has made numerous requests for special temporary authority and OFS 18 GHz licenses, which heretofore were routinely granted. In January, 1995, Time Warner began filing petitions to deny both the OFS and STA applications of its only competitor in this market. Time Warner cited Liberty's complaint in the First Amendment lawsuit and Liberty's allegation therein that in several instances, Liberty had extended service from building served by microwave to separately owned and operated buildings without the use of public property or rights of way. Liberty disclosed its service to

these so-called "Non-Common Systems" in the First Amendment lawsuit in order to secure a court ruling on the constitutionality of 47 USC §522(7)(B) and, in particular, the constitutional validity of the burdens which that provision os the 1984 Cable Act imposes on speech and press activity occurring wholly on private property. The United States and the Commission were notified of this lawsuit by Liberty and the district court and have participated fully in the lawsuit.

While the Commission has withheld decisions on the pending OFS applications and STA requests for an extraordinary period of time, presumably while it considers the significance of these applications, if any, of Liberty's operation of these so-called "Non-Common Systems," it has simultaneously moved to prevent Liberty from securing a judicial declaration of the constitutionality of §522(7)(B) and therefore prevent Liberty from securing a judicial declaration of the legality of the Non-Common Systems. In other words, the Commission is actively seeking to prevent Liberty from obtaining a court ruling on the legality of the systems which apparently are the impediment to the pending OFS applications and STA requests.[11/]

[11/]Liberty's explanation of the constitutional claims being litigated in the First Amendment lawsuit in this submission does not constitute the submission of such issues to the Commission. These issues are before the federal courts, the proper forum for their resolution.

B. **Liberty's Business Is At Risk**

Since virtually the filing of Time Warner's first petition to deny, the FCC has not granted any of Liberty's OFS applications. Liberty has not activated service to a new building in more than two months. As a result of Time Warner's petitions to deny, Liberty's business has ground to a halt and will remain in that position unless and until the Commission acts. At the same time that Liberty is foreclosed from providing service to subscribers who have requested such service, Time Warner is using this proceeding as a marketing tool. Recently, Time Warner has sent communiqués to residents of at least two buildings that are in the midst of contracting with Liberty.[12/] On page 4 of the letter, Time Warner makes reference to Liberty's admissions to the Commission to disparage Liberty's character. The letter also refers to the NYSCC proceeding and the First Amendment case to the same end. At the same time that Time Warner is mounting its attack, Liberty is at risk of defaulting on some of its contracts -- an occurrence that will surely be exploited by the Time Warner marketing machine.

[12/]The June 2, 1995 letter, written and signed by Richard Aurelio, the President of Time Warner New York City Cable Group (parent of Time Warner Cable of New York City and Paragon Cable Manhattan, the two franchised cable operators in Manhattan), was sent to residents of 15 West 81st Street and 211 Central Park West. A copy of the June 2 letter is annexed hereto as Exhibit 4.

Liberty has acknowledged the careless mistakes it made and will submit to an appropriate sanction. The appropriate context for such sanction is a determination of the merits of the petitions to deny. We urge the Commission to recognize that its actions in withholding decision on the pending applications, while at the same time preventing Liberty from obtaining a judicial declaration of the legality of the "Non-Common Systems" do not advance the interests of Liberty's subscribers, the goals of the Cable Act or the public at large. It only aids and abets the predatory and exclusionary tactics of a monopolist who is manipulating the Commission's procedures to destroy its only competitor. Liberty has, by its own lack of an internal compliance procedure, added fuel to the fire commenced by Time Warner. However, Liberty's mistakes do not justify the punishment sought by Time Warner -- putting Liberty out of business by revoking its right to operate and decimating its credibility in the marketplace. Liberty is in the process of instituting controls through its counsel in an effort to ensure that no facilities are rendered operational in the future unless and until Liberty has received authorization to do so.

In conclusion, Liberty repeats its request that the Commission grant its STAs immediately.

Respectfully submitted,

Howard J. Barr
Counsel for Liberty Cable Co., Inc.

cc: Arthur H. Harding, Esq.
Regina M. Keeny, Esq.

EXHIBIT 1

Declaration Under Penalty of Perjury

I, Behrooz Nourain, depose and state as follows:

1. I am Director of Engineering for Liberty Cable Co., Inc. I do not believe that I provided a false affidavit in the course of this proceeding, nor has it ever been my intention to do so.

2. Time Warner alleges that, in light of statements I made in my February 21, 1995 affidavit, that my declaration submitted in connection with Liberty's Surreply, filed May 17, 1995, is false. That allegation is misplaced.

3. My February affidavit, which was submitted in order to correct misstatements made in an affidavit submitted by Time Warner, in large party addressed technical matters related to the distribution of video programming in the 18 GHz band. My February affidavit was submitted in connection with federal court litigation relating to Liberty's connection of certain non-commonly owned properties via cable utilizing private property ("Non-Common Systems") and whether those Non-Common Systems can constitutionally be classified as "cable systems" under the Cable Act.

4. Even prior to the commencement of the lawsuits, I was aware of allegations that Liberty's Non-Common Systems involved the provision of "cable service" without a local franchise. It had been decided that we should explore whether any of the Non-Common Systems could be served via 18 GHz microwave and if that were possible to obtain authorization to do so. I proceeded to set the process in motion by performing (or having performed under my direction) line of site studies; initiating the necessary prior coordination process; and, through counsel,

filing applications on November 7, 1994 to establish microwave paths of communications to a number of such properties.

5. I was of the understanding at the time I submitted the February affidavit that the applications to establish microwave paths to buildings served in the Non-Common Systems configurations, and only those applications, were being opposed by time Warner. The locations we proposed to serve by microwave are presently served by the Non-Common System configuration and have never been served by microwave. I had no knowledge that Time Warner was filing oppositions against all of Liberty's applications for microwave authorizations, including the applications to provide service to the locations Liberty was serving without authority, until April of 1995, as I stated in the Surreply.

6. While perhaps I should have discussed this in the Surreply, during the preparation of that document I was focusing on the locations discussed in that document, none of which are or have been served by a Non-Common System via microwave had been opposed by Time Warner. I was unaware until that time that Time Warner had been systematically opposing all Liberty applications.

7. My responsibilities at Liberty have at all times pertained only to the technical aspects of Liberty's operations. I am not now, nor have I ever been, involved in Liberty's day-to-day business and/or legal affairs.

8. Page three of the Surreply, filed May 17, 1995, refers to my mistaken assumption of the "grant of the STA requests." Any reading of my statements in that document as being in reference to the May 4, 1995 STA requests strains the meaning and intent of my statements. It